IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE	)	
	)	
Appellant,	)	
v.	)	E2012-00448-SC-R10-DD
	)	
	)	
LEMARICUS DEVALL DAVIDSON	)	Knox County 86216 B
	)	
Appellee.	)	

LEMARICUS DEVALL DAVIDSON'S RESPONSE TO APPLICATION OF THE STATE OF TENNESSEE FOR AN EXTRAORDINARY APPEAL PURSUANT TO RULE 10 OF THE TENNESSEE RULES OF APPELLATE PROCEDURE

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II. Whether the trial court properly applied the law in finding that structural error in this case required a new trial?

INTRODUCTION

As noted by the Tennessee Court of Criminal Appeals in its Order denying the State's Rule 10 Application in that Court: "even if this Rule 10 application is granted, this Court would not be reviewing all of the issues regarding the convictions and sentences. The result of an extraordinary appeal could only be either (1) new trials as currently ordered, or (2) further appeals by the Defendants on the remaining issues (or possibly *another* application by the State to appeal if the trial court granted any of the Defendants a new trial on another ground)." Order, Tennessee Court of Criminal Appeals, Appendix A, State's Addendum 25 at 3[1] (emphasis in original).

Further, contrary to the State's insistence, "it is clear from the record before us that former Judge Baumgartner explicitly reserved acting as thirteenth juror on Defendant Davidson's convictions." Order, State's Addendum 25 at 7. Thus, regardless of the basis upon which Successor Judge Blackwood determined he could not serve as thirteenth juror, the only remedy is a new trial.

Finally, the State questions the propriety of the trial court's finding that Structural Error existed in the trials of Mr. Davidson and his co-defendants because there has been no showing of prejudice. The argument in the trial court and the finding made by the trial court was that structural error existed as a result of the addiction, criminal disposition, and behavior of the former judge both inside and outside the courthouse. By definition, structural error requires no showing of prejudice. The only remedy for the

[1] The service copy of the State's Addendums provided to undersigned counsel omits page 7 of Addendum 25. Accordingly a complete copy of the Order of the Tennessee Court of Criminal Appeals denying the State's Rule 10 Application is attached hereto as Appendix A.

deprivation of due process that exists as a result of these trials being conducted under the auspices of such corruption is a new trial.

The Court of Criminal Appeals aptly noted, "As previously stated, the State explicitly chose not to seek appellate review as to Defendant Coleman's case. The only difference we can detect in Defendant Coleman's case and those of the other three Defendants is the *degree* of the problems that caused the trial court to render its ruling, not the existence of the problems." Appendix A, State's Addendum 25 at 6. (emphasis in original.)

If the trial court was correct in its ruling on either structural error or the 13th juror rule, Mr. Davidson is entitled to a new trial. Either is sufficient to mandate a new trial. Even if this court were to determine that the trial court was incorrect, this matter would still be at the motion for new trial stage with additional assignments of error to be litigated any one of which could very well result in Mr. Davidson being granted a new trial.

For these reasons and those more fully articulated herein, in granting Mr. Davidson a new trial, Judge Blackwood neither departed so far from the accepted and usual course of judicial proceedings as to require immediate review nor is review by this court at this time necessary for complete determination of the action on appeal. Accordingly, the State cannot meet the standard for granting an extraordinary appeal under Rule 10 and the Application should be denied.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The uncontroverted and stipulated proof from the TBI's Investigative file showed that former Judge Baumgartner was in the midst of years of drug abuse and illegal conduct leading up to and during Mr. Davidson's trial and that continued throughout the period when all the co-defendants in this matter were on trial.

As early as 2008, former Judge Baumgartner admitted to his doctor that he was addicted to narcotics and at that time was advised to leave the bench and seek psychiatric help. *See* State's Addendum 15, Int. with Dr. Conley, at DA/TBI000803. However, rather than taking this advice, former Judge Baumgartner remained on the bench and embarked on a three-year period of deceit and misconduct in attempts to both feed and cover up his addiction.

Over the course of this period, which encompassed Mr. Davidson's trial, former Judge Baumgartner was buying large amounts of narcotics from both Deena Castleman, a woman who had previously been a defendant in his Drug Court program, and Chris Gibson, a drug dealer who had been before the former judge in criminal court. Former Judge Baumgartner's relationship with Ms. Castleman began in 2008 when she came to see him about helping her find employment after she completed her Drug Court program, but instead of helping her, the former judge asked her to sell him narcotics. *See Id.*, Int. with Deena Castleman, at DA/TBI-000451. Through Ms. Castleman, the former judge later met Christopher Gibson, and began buying large quantities of narcotics through him as well. *See Id.*, Int. with Deena Castleman at DA/TBI-000493; Int. with Chris Gibson at DA/TBI-000441. According to witnesses, former Judge

Baumgartner would also leave during breaks in trial as well as during jury deliberations to meet Gibson or Castleman to purchase pills including sometimes having Ms. Castleman deliver to his chambers. *See Id.* Int. with Jennifer Judy at DA/TBI-000948-949; Int. with Deena Castleman at DA/TBI-000833; Int. with Lisa Mooneyham at DA/TBI-000826; Int. with Gloria McMahan at DA/TBI-000925.

Judge Baumgartner also used his power as an officer of the court in dishonest and manipulative ways. For example, in March of 2010, He arranged for a private drug screen of Ms. Castleman by court personnel in a manner inconsistent with procedure then lied about the results to the director of Ms. Castleman's housing facility. *See Id.* Int. with Annette Beebe at DA/TBI-000835; Int. with Deena Castleman at DA/TBI-000832; *See* Int. with Helen White at DA/TBI-000951.

Former Judge Baumgartner used his power to attempt to persuade General Sessions Judge Andrew Jackson and Assistant District Attorney Jeff Blevins to make biased decisions in the criminal case involving a drug possession charge against Ms. Castleman. In late October 2009, **during** Mr. Davidson's trial, Ms. Castleman was charged with possession of narcotics that were found hidden in her hospital room at St. Mary's. *See Id.*, Int. with Haley Starr at DA/TBI-000773; Int. with Deena Castleman at DA/TBI-000848-49; Int. with Larry Allen at DA/TBI-000774; Hospital Records at DA/TBI-000854. According to Ms. Castleman, she had been supplying pills to the former judge while she was in the hospital, and the pills that were found by hospital staff were intended for former Judge Baumgartner. *See Id.* Int. with Deena Castleman at DA/TBI-000848-49. Further, the former judge had brought her 20-30 Xanax while she was in

the hospital, and hospital staff had noticed that Ms. Castleman seemed "high as a kite" on occasions after Judge Baumgartner would visit her. *See Id.* Int. with Margaret Hinkle at DA/TBI-000852. Because of this and the pills found in her room, Ms. Castleman was placed on supervised visitation status. *See Id.* Int. with Margaret Hinkle at DA/TBI-000852; Int. with Gloria McMahan at DA/TBI-000925. According to staff, when Judge Baumgartner learned about Ms. Castleman's restricted visitation status, he "raised hell." *See Id.* Int. with Gloria McMahan at DA/TBI-000925; Int. with Jennifer Kern at DA/TBI-000927; Int. with Margaret Hinkle at DA/TBI-000852. In an effort to gain access to her while she was in the hospital in order to continue to illegally obtain narcotics, but additionally to cover up the nature of their relationship, former Judge Baumgartner lied to nursing staff about the reasons for his need for unsupervised visitation. To one nurse, the former judge claimed to be Ms. Castleman's attorney, and therefore he needed unsupervised visitation with her due to attorney-client privilege. *See Id.* Int. with Gloria McMahan at DA/TBI000925. To another nurse, the former judge explained that he and his wife were special mentors to "troubled youth," and they had taken Castleman under their wing. *See Id.* Int. with Jennifer Kern at DA/TBI-000927.

Later, upon her charge for possession, former Judge Baumgartner contacted not only Judge Jackson, who was the judge presiding over the case, but also Mr. Blevins, the ADA handling the prosecution of Ms. Castleman's charge, in attempts to persuade them to drop the case. According to Judge Jackson, Judge Baumgartner approached him and told him that Ms. Castleman's probable cause hearing was coming up on his docket and asked him to take a special look at Ms. Castleman's case. *See Id.* Int. with

Judge Jackson at DA/TBI-000900. Likewise, ADA Blevins told investigators that Judge Baumgartner had asked him to "do what he could" for Ms. Castleman. *See Id.* Int. with Jeff Blevins at DA/TBI-001042.

Mr. Davidson's trial fell in the middle of the period when the judge's abuse of narcotics was heaviest. In fact, the evidence supports that the former judge's addiction, and by implication, the need to favor law enforcement and prosecution, extended well to the proceedings prior to the trial, and continued through the course of the trial in this matter and in post-trial proceedings up and until the judge stepped down from the bench. The prescription records alone indicate that former Judge Baumgartner presided over key occurrences in Mr. Davidson's case while under the influence of narcotics. According to the prescription records, former Judge Baumgartner filled a prescription for thirty (30) hydrocodone on October 12, the week that pretrial hearings were held in Mr. Davidson's case. *See Id.* Prescription Records at DA/TBI000467. Likewise, during Mr. Davidson's trial on October 28, 2009, the former judge was first prescribed oxycodone, a stronger narcotic than hydrocodone. *Id.*

In addition to the heavy use of these prescriptions, former Judge Baumgartner was taking an additional ten (10) to twenty (20) hydrocodone per day or twenty (20) to thirty (30) roxycodone every two (2) to three (3) days, which he purchased from Chris Gibson or Ms. Castleman. *See Id.* Int. with Chris Gibson at DA/TBI-000443; Int. with Deena Castleman at DA/TBI-000848-49; Int. with Crystal Uthe at DA/TBI-000253. Indeed, his demand for narcotics was so great, Mr. Gibson found it difficult to keep former Judge Baumgartner supplied. *See Id.* Int. with Randall Claunch at DA/TBI-

000392-93. When he did not have enough to meet the former judge's demand, Gibson often bought pills to sell to Judge Baumgartner from his ex-wife Darlene Gray as well as Nicole Tyson. *See Id.* Int. with Darlene Gray at DA/TBI-001184. Indeed, former Judge Baumgartner's tolerance and addiction was such that he was not only taking the pills orally, witnesses saw him crush and snort the narcotics. *See Id.* Int. with Darlene Gray at DA/TBI-001184; Int. with Deena Castleman Phone Conversation Transcripts DA/TBI-000998.

It is also clear from investigation witnesses that the former judge did not refrain from taking these drugs while he was on the bench. According to Chris Gibson, "it was not uncommon" for the judge to call during a break in a trial about getting pills. *See Id.* Int. with Chris Gibson at DA/TBI-000443. Ms. Castleman also acknowledged that she would bring pills to the judge in his office during breaks in court. *See* Int. with Deena Castleman at DA/TBI-000833. Indeed, Mr. Gibson noted that he had supplied the judge with "extra" pills when he went to Nashville for the Vanessa Coleman trial to last him until he got back to Knoxville, and it was during the Mr. Davidson's trial that the former judge had been visiting Ms. Castleman at St. Mary's to buy pills both during the day at breaks in the trial and in the evenings. *See Id.* Int. with Chris Gibson at DA/TBI-000443-46; Int. with Deena Castleman at DA/TBI-000492-93; Int. with Gloria McMahan at DA/TBI000925. Likewise, Jennifer Judy noted that she cashed checks for the former judge several times a week and he would leave the office afterwards with the cash and return about an hour later. *See* Int. with Jennifer Judy at DA/TBI-000949.

Further, multiple court officers and staff noticed the former judge's odd behavior

while he was on the bench and on other occasions that suggested he was using drugs while presiding over court. Lisa Mooneyham, a Drug Court probation officer told investigators that former Judge Baumgartner appeared "out of it" on the bench and on several occasions, and many times he would have a "blank stare" on his face. *See Id.* Int. with Lisa Mooneyham at DA/TBI-000827. Likewise, Assistant District Attorney Leland Price, assigned to prosecute Mr. Davidson, noticed the Judge's "odd behavior" during the Vanessa Coleman jury selection in Nashville, citing his incoherent, slurred speech, and problems putting sentences together. *See Id.* Int. with Leland Price at DA/TBI-000891. He also noted that Judge Baumgartner had to enlist the help of the court clerk to assist him in reading the verdict form a few days later during the Coleman trial, and he could not progress through the alphabet in listing off the charges. *See Id.* Int. with Leland Price at DA/TBI-000892. Moreover, Takisha Fitzgerald, the other Assistant District Attorney assigned to prosecute Mr. Davidson, noticed that the Judge appeared to be "slumped back" and sleeping during Vanessa Coleman's jury selection. *See Id.* Int. with Takisha Fitzgerald at DA/TBI-000970. Further, both ADAs noticed that the former judge had been swerving all over the road while they were behind him on the interstate back to Knoxville from Nashville. *See Id.* Int. with Leland Price at DA/TBI-000892; Int. with Takisha Fitzgerald at DA/TBI-000970. Likewise, at Mr. Thomas's jury selection, Mr. Price noticed the Judge interrupted the proceedings multiple times to take phone calls, and Ms. Fitzgerald noticed that the Judge looked "tired" during that time as well. *See Id.* Int. with Takisha Fitzgerald at DA/TBI000970; Int. with Leland Price at DA/TBI-000891.

Perhaps the most disturbing details of the extent of the former judge's mental incompetence while on the bench come from Judge Baumgartner's own secretary, Jennifer Judy. Ms. Judy told investigators that the former judge began exhibiting odd behavior in December 2008, noting that he sometimes could not carry on conversations, was taking large numbers of unknown pills, and was allowing Ms. Castleman, who would come to his chambers obviously high on drugs, to visit him frequently behind closed doors in his office. *See Id.* Int. with Jennifer Judy at DA/TBI-000945-48. According to Ms. Judy, as his addiction to narcotics became worse, the judge would have to reschedule the docket and meetings because he was so impaired he could not function. *See Id.* Int. with Jennifer Judy at DA/TBI-000945-48. She cited multiple instances where she would tell the former judge he was too impaired to sit on the bench, but that he would insist he was not too impaired to do "the little things" and that he could "buck up." *See Id.* Int. with Jennifer Judy at DA/TBI-000945-48. Ms. Judy remembered a specific instance from Ms. Coleman's trial when the judge actually put his head down on the bench during the reading of the verdict. *See Id.* Int. with Jennifer Judy at DA/TBI-000946. Ms. Judy passed him a note telling him to sit up, in response Judge Baumgartner sent a note back saying "I am sitting up you ****[expletive deleted]." *See Id.* Int. with Jennifer Judy at DA/TBI000946. When Ms. Judy confronted the judge about this later that day, he had no recollection of writing her the note. *See Id.* Int. with Jennifer Judy at DA/TBI-000946.

STANDARD OF REVIEW

Extraordinary Appeal pursuant to Rule 10

Application for an extraordinary appeal from an interlocutory order of the trial court may be sought if:

(1) if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or

(2) if necessary for complete determination of the action on appeal as otherwise provided in these rules.

Tenn. R. App. Pro. 10.

"The circumstances in which review is available under this rule, however, are very narrowly circumscribed to those situations in which the trial court or the intermediate appellate court has acted in an arbitrary fashion, or as may be necessary to permit complete appellate review on a later appeal." Advisory Commission Comment, 2005.

The standards for common law writs of certiorari also apply to consideration of whether a Rule 10 extraordinary appeal is appropriate. *State v. Willoughby,* 594 S.W.2d 388 (1980). These standards include:

a. Where the ruling of the court below represents a fundamental illegality.

b. Where the ruling constitutes a failure to proceed according to the essential requirements of the law.

c. Where the ruling is tantamount to the denial of either party of a day in court.

d. Where the action of the trial judge was without legal authority.

e. Where the action of the trial judge constituted a plain and palpable abuse of discretion.

f. Where either party has lost a right or interest that may never be recaptured.

Id. at 392 (*citing State v. Johnson*, 569 S.W.2d 808 (Tenn. 1978).

Heightened Standard of Due Process in Death Penalty Cases

In this case, and in the cases of each of the co-defendants, the State sought the death penalty, the ultimate penalty that the laws of the State of Tennessee permit to be inflicted upon a person properly convicted and properly sentenced for first degree murder. Only Mr. Davidson was sentenced to death. Death penalty cases are afforded protections exceeding those applicable to other types of cases. All death penalty cases require a heightened standard of due process and careful scrutiny of error. *See Sawyer v. Smith*, 497 U.S. 227, 244 (1990); *Zant v. Stephens*, 462 U.S. 862, 885 (1983); *Duggard v. Adams*, 489 U.S. 401, 414 (1989); *Satterwhite v. Texas*, 486 U.S. 249, 250 (1988). Although not all errors justify reversal "the severity of the sentence mandates a careful scrutiny of any curable claim of error." *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

ARGUMENT

The State's Application For Extraordinary Appeal Pursuant To Rule 10 Of The Tennessee Rules Of Appellate Procedure Should Be Denied Because The Trial Court Did Not Depart From The Accepted And Usual Course Of Judicial Proceedings Nor Is This Courts' Intervention Necessary To Ensure A Complete Determination Of The Action On Appeal As Otherwise Provided By The Rules.

The circumstances under which the Court may review an interlocutory order of a trial court are specifically limited to when the lower court has "acted in an arbitrary fashion, or as may be necessary to permit complete appellate review on later appeal." Advisory Commission Comment, Rule 10. Contrary to the State's contention, there is no evidence in this record that Judge Blackwood acted arbitrarily in granting Mr. Davidson a new trial or that an extraordinary appeal now is necessary to permit complete appellate review on later appeal.

The trial Judge clearly failed to act as thirteenth juror in Mr. Davidson's case, and this mandatory duty thus fell to successor Judge Blackwood. Judge Blackwood specifically found that the credibility of witnesses and the credibility of the presiding judge were at issue and that he could therefore not act as 13th juror in Mr. Davidson's case. An appellate Court may only remand for a new trial if the 13th juror function was not properly exercised. *State v. Dankworth,* 919 S.W. 2d 52, 57 (Tenn. Crim. App. 1995). This Court cannot substitute its judgment for that of the successor judge in determining whether he can act as thirteenth juror. *See Id.*

Additionally, the record is clear that Judge Blackwood made the only decision he could make given the voluminous, stipulated, and uncontroverted evidence of pervasive

judicial misconduct throughout the litigation of Mr. Davidson's case. The error that resulted from the trial judge's drug addiction and criminal acts committed before, during, and after Mr. Davidson's capital trial was structural error. Accordingly, Mr. Davidson is entitled to a new trial without any showing of specific prejudice.

The Trial Court Correctly Analyzed And Applied The Law Pertaining To The Courts' Thirteenth Juror Obligations And Granted Mr. Davidson A New Trial On The Basis That The Trial Judge Had Not Acted as Thirteenth Juror and the Successor Judge In Mr. Davidson's Case Was Not Able To Act As Thirteenth Juror

Rule 33 of the Tennessee Rules of Criminal Procedure provides that the "court may grant a new trial as required by law" either on its own initiative or upon motion of the defendant. Tenn. R. Crim. Pro 33(a). Further, after a finding of guilty by a jury, the trial court is to review the weight of the evidence and may grant a new trial if it disagrees with the jury's determination with regard to the weight of the evidence. Tenn. R. Crim. Pro. 33(d). Rule 33 is a codification of the common law thirteenth juror rule. *State v. Carter*, 896 S.W.2d 119, 122 (Tenn. 1995) (finding that the common law thirteenth juror rule had be restored by the enactment of Tennessee Rule of Criminal Procedure 33(f)). The language of Rule 33(f) is now found in Rule 33(d).

The purpose of the thirteenth juror rule is to prevent a miscarriage of justice. *State v. Moats*, 906 S.W.2d 431, 434-435 (Tenn. 1995) (*citing State v. Johnson*, 692 S.W.2d 412, 415 (Tenn. 1885) (Drowota, J. dissenting.))

> ...the circuit judge hears the testimony, just as the jury does, sees the witnesses, and observes their demeanor upon the witness stand; that, by his training and experience in the weighing of testimony, and the application of legal rules thereto, he is especially qualified for the correction of any errors into which the jury by inexperience may have

> fallen, whereby they have failed, in their verdict, to reach the justice and right of the case, under the testimony and the charge of the court; that, in our system, this is one of the functions the circuit judge possesses and should exercise – as it were, that of a thirteenth juror...

Moats, 906 S.W.2d 431, 433 (*quoting Cumberland Telephone and Telegraph Co. v. Smithwick*, 79 S.W. 803, 804 (Tenn. 1904.)

A judge's duty to act as thirteenth juror is mandatory. *Carter*, 896 S.W.2d 119, 122. Judicial review as thirteenth juror is a prerequisite to the entry of a valid judgment. *Id.*

In the event that the trial judge is unable to continue after a verdict of guilt due to absence, death, sickness, or other disability a successor judge may complete the duties of the court. Tenn. R. Crim. Pro. 25. Where however, the successor judge concludes that they cannot perform the remaining duties as a result of the successor judge not having presided over the trial or for any other reason, the successor judge may grant a new trial. *Id.*

It is the trial judge, immediately after trial, that is in the same position as the jury to evaluate the credibility of witnesses and weight of the evidence. *Moats,* 906 S.W.2d 431, 434. Accordingly, the trial judge is in the best position to evaluate the credibility of witnesses and when a successor judge is called upon to exercise the role of thirteenth juror, they must first determine whether the duties of the original judge, including assessing witness credibility, can be exercised by the successor judge. *State v. Nail*, 963 S.W.2d 761, 765 (Tenn. Crim. App. 1997.)

Where the trial court has failed to perform as thirteenth juror or performed improperly a new trial is required. *State v. Dankworth,* 919 S.W.2d 52 (Tenn. Crim. App. (1995)). If the record is inadequate, or the successor judge determines they cannot fulfill the thirteenth juror role on the basis of the record, a new trial is required. *See Nail,* 963 S.W.2d at 765-66; *State v. Bilbrey,* 858 S.W.2d 911, 915 (Tenn. Crim. App. 1993). Where the credibility of witnesses is essential to the exercise of the thirteenth juror role of the successor judge, a new trial is required. *State v. Brown*, 53 S.W.3d 264, 275-76 (Tenn. Crim. App. 2000); *see also State v. Biggs*, 218 S.W.3d 643, 655 (2006). In a first degree murder case, the court has a duty to exercise its thirteenth juror role in reviewing the sentence fixed by the jury as well. *See* Tenn. Code Ann. §39-13-204(k).

At trial, Mr. Davidson presented evidence to dispute not the existence of, but the interpretation of the forensic evidence presented by the State.[2] Accordingly, the determination of the credibility of the testimony of the witnesses presenting these competing theories was the central issue at trial and is the crucial determination that must be made in evaluating Mr. Davidson's motions for new trial[3]. At trial, a number of

[2] A summary of the theory offered by the State at trial and the alternate theory offered by Mr. Davidson's defense can be found in State's Addendum 8, Mr. Davidson's Amended Motion for New Trial alleging violations of the 13th juror rule. Examples of specific testimony by both trial and sentencing witnesses which required credibility determinations may also be found in State's Addendum 8, Mr. Davidson's Amended Motion for New Trial alleging violations of the 13th juror rule.

[3] Subsequent to the filing of motions for new trial related to issues pertaining to Judge Baumgartner's misconduct, and other motion for new trial issues were held in abeyance and rendered moot by the grant of a new trial. In the event the successor judge's decision were overturned, additional amendments to Mr. Davidson's motions for new trial addressing issues not pertaining to judicial misconduct or the thirteenth juror rule would need to be filed and, along with errors put forth in Mr. Davidson's original Motion for New Trial, heard by the trial court.

witnesses provided testimony that supported Mr. Davidson's theory. Thus the jury and the Court in acting as thirteenth juror, had to make determinations about which of the witnesses are more credible and which explanation of events is to be believed.

Thus, witnesses' credibility determinations were an essential issue that must be determined by the Court in functioning as thirteenth juror. "It is difficult to see how a trial judge who has not heard the evidence and who has not seen the witnesses can act as the thirteenth juror when weight and credibility are issues." *State v.* Brown, 53 S.W.3d 26 (2000). It is immediately after trial when the judge who witnesses the proceedings is in the same position as the jurors to weigh the evidence and credibility of witnesses. *State v. Moats*, 906 S.W.2d 431, 434 (1995). It is for this reason that a new trial is required where the thirteenth juror function was not properly exercised. *See Id.*

Tennessee Code Annotated §39-13-204 contemplates that the trial court must also evaluate capital sentencing proceedings under the standards governing motions for new trial. Tenn. Code Ann. §39-13-204(k). This should require that the trial judge act as thirteenth juror with regard to the sentencing proceedings and the weighing of aggravating and mitigating sentencing factors in the context of a capital case. In this case, the jury elected to impose a sentence of death on each of the four death eligible counts of conviction for the murders of Channon Christian and Christopher Newsom. The trial judge did not pass on the propriety of the death sentence as thirteenth juror. State's Addendum 3 at 1415. The trial judge, due to his impairment by narcotics and criminal activities, did not continue to the present motion for new trial proceedings, and

thus never effectuated the court's mandatory duty to act as thirteenth juror in the sentencing context.

Without the opportunity to personally observe the witness with only the record to guide the successor judge, the Court is in too tenuous and weakened position to act as thirteenth juror and execute Mr. Davidson. "In the trial forum alone is there a human atmosphere" that cannot be reproduced with a written record. *State v. Dankworth,* 919 S.W.2d 52, 55 (Tenn. Crim. App. 1995.) It is for this reason that appellate courts cannot and will not determine the weight and credibility of witnesses' testimony and why that is reserved solely for the trial judge. *See Id.* Certainly, this human atmosphere could not be more important than in a capital sentencing.

Though the State attempts to persuade this Court that the trial judge had already acted as thirteenth juror by his "clear approval" of the jury verdicts and because in the State's description the trial judge "readily accepted and applied the proof presented by the State and accredited by the jury" that is simply not the case. Application at 19. With regard to Mr. Davidson, the State points to two excerpts from the transcript it argues show that the trial judge clearly approved the jury's verdict and sentence of death. Application at 18-20. These two statements by the trial judge were made only in reference to the judge determining whether certain enhancing factors might apply and cannot be stretched out of context to fit the mandates of the Court's thirteenth juror function. *See* State's Addendum 3 at 1397-1415.

In fact, the trial judge indicated that he was reserving his thirteenth juror opinion during the course of the sentencing proceedings in Mr. Davidson's case. "The **jury** has

determined that you're guilty beyond a reasonable doubt of the first-degree murder of these two young people. **They've** determined that the appropriate sentence is death. I think -- I have a motion for new trial to go, so **I'm going to reserve expressing my opinion** on that until we have a motion for new trial." State's Addendum 3 at 1415. (emphasis added.)

The credibility of witnesses at trial and sentencing was of primary importance in this case. Accordingly, the successor judge is in no position to carry out the Court's mandatory duty to act as thirteenth juror on the basis of the record alone. See *State v. Moats,* 906 S.W.2d 431, 434-435 (Tenn. 1995) (See also, Drowata, J. dissenting, *Moats,* 906 S.W.2d at 436 stating that the Court must have an independent recollection of the trial proceedings and a simple reading of the record on remand if the remedy for a failure under the thirteenth juror rule would not suffice.) Furthermore, as a result of the trial judge's criminal conduct and dependence on drugs during the course of the trial and pre-trial proceedings, the record itself, as it now stands before the Court, is suspect.

It is in this context of addiction and impairment in which the trial judge ruled on evidentiary issues, determined pre-trial motions, ruled on Mr. Davidson's motions for mistrial and motion for judgment of acquittal during the course of trial, observed the witnesses, and controlled the conduct and course of the proceedings that resulted in the record before the court. It is not only improbable, but impossible that the trial judge's function in determining these issues was not affected by his impairment. With a sober judge, the record at this stage of the proceedings may have different, or more worthy of this Court's reliance. Unfortunately, the record as it exists is tainted by the trial judge's

conduct which is outlined below and is therefore not sufficiently reliable for the successor judge to rely upon in fulfilling its mandatory duty as thirteenth juror.

Under these circumstances, Judge Blackwood, as successor judge was required to determine whether he could effectuate his thirteenth juror duties on the basis of the record alone. After considering the record, Judge Blackwood determined that the credibility of witnesses was at issue at trial. The fact that he also found that the credibility of the presiding judge was at issue does not undermine his determination as to witness credibility. Tennessee law clearly mandates that where the credibility of witnesses is an overriding issue a successor judge cannot act as thirteenth juror. *State v. Biggs*, 218 S.W.3d 643 (2006); *State v. Brown*, 53 S.W.3d 26 (2000).

Tennessee Rule of Criminal Procedure 25(b) provides:

> If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict of guilty, any other judge regularly sitting in or who may be assigned to the court may perform those duties. If the successor judge is satisfied that he or she cannot perform those duties because he or she did not preside at the trial **or for any other reason**, the successor judge may exercise the **discretion** to grant a new trial.

(emphasis added.)

Judge Blackwood was certainly not prohibited from making additional findings, and his statement that the credibility of the judge was also in question is a telling reflection on the record on which he would be required to rely had he been capable of acting as thirteenth juror. He was simply not required to base his decision that he could

not act as thirteenth juror on witnesses credibility alone and was well within is authority to exercise his discretion in granting a new trial under these circumstances.

The appellate court "'has no independent authority to act as a thirteenth juror;' thus, the remedy for the trial judge's failure to properly function as thirteenth juror is to remand the case for a new trial." *Brown,* 53 S.W.3d 274 *quoting State v. Burlison,* 868 S.W.2d 713, 719 (Tenn.Crim.App.1993). Judge Blackwood was well within the authority granted him by Rule 25, and the other authorities cited herein. He did not depart from the accepted and usual course of judicial proceedings. Accordingly, the State's Application for this Court's interlocutory review of Judge Blackwood's ruling that he could not act as thirteenth juror is not well taken. This Court's authority is limited to determining whether the thirteenth juror function was exercised by the trial judge. *State v. Dankworth*, 919 S.W.2d 52, 59 (Tenn. Crim. App. 1995). It is clear in Mr. Davidson's case that the trial judge had not done so. The successor judge found that he could not do so, and this Court cannot direct him that he can. A new trial is the only available remedy.

Furthermore, the trial judge's failure to act as 13th juror and the successor judge's ruling that he cannot do so requires a new trial independent of the court's decision that structural error resulting from the trial judge's misconduct also requires that Mr. Davidson receive a new trial. Although, either of these grounds justify a new trial in this case, Mr. Davidson submits that the trial court's determination on the thirteenth juror issue is dispositive regardless of that court's or this Court's consideration of the structural error issue. Nonetheless, because the structural error infecting Mr.

Davidson's trial and subsequent death sentence, also mandates a new trial in this case and has been challenged in the State's Rule 10 application, it will be addressed below.

The Trial Court Correctly Applied The Law And Granted Mr. Davidson A New Trial On The Basis Of Structural Error

"A trial is either fair or not. Evidence of judicial corruption requires reversal regardless of the other facts of the particular case. The denial of the petitioner's right to an impartial judge is a constitutional error affects the integrity of the judicial process. A new trial is the only remedy." *State v. Benson,* 973 S.W. 2d 202, 207 (Tenn. 1998) (citing *State v. Bobo*, 814 S.W. 2d 353, 357 (Tenn. 1991)). Thus, this Court has acknowledged the paramount importance of a fair trial free of judicial partiality or corruption. The presence of judicial bias or corruption fatally compromises our system of justice.

> One's legal conscience simply recoils at the shocking thought that the due process clause of the Fourteenth Amendment is satisfied by a judge presiding over a criminal trial and making life or death sentencing decisions while under the influence of, or materially impaired by, the use of an illegal mind-altering substance. Such proceedings before a mentally incompetent judge would be so fundamentally unfair as to violate federal due process under the Constitution.
>
> ...
>
> The experts tell us that we can tolerate a certain number of insignificant parts of arsenic in our drinking water and a certain number of insignificant parts of arsenic our drinking water and a certain irreducible number of insect parts in our edible grain supplies, but we need not, and we should not, similarly tolerate a single drug addicted jurist whose judgment is impaired, especially in a case involving life and death decisions. Neither should we put to death any prisoner so condemned by such a wayward judge.
>
> ...

It is difficult to gainsay the importance of enforcing with efficient and sensible sanctions the core due process guarantees in our Constitution. To look the other way in the face of certain serious constitutional deficiencies is to render those guarantees "'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties." *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.ED.2d 1081 (1961). Frequently we do use the doctrine of harmless error with respect to a wide spectrum of constitutional failures, but not such a fault involving the performance of a judge who was demonstrably not impartial. *See Arizona v. Fulminante*, 499 U.S. 279, 306-311, 111 S.CT. 1246, 113 L.Ed.2d 302 (1991). **The Supreme Court has labeled this kind of systemic defect "structural error" and rendered it categorically immune from harmless error analysis.** *Id.* at 309-10, 111 S.Ct. 1246; *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). The reason for regarding this level of constitutional failure as "structural" is obvious: impartiality is the *sine qua non* of judging. Bias or favoritism is utterly irreconcilable with and necessarily perverts the judicial function. The rule of law which provides the framework for our system of justice is thwarted by a judge marching to an unauthorized drummer.

Is the problem materially different if the failure of the judge properly to exercise his judgment stems from the influence of illegal drugs rather than the influence of illegal money? We think not. In both cases, the litigant is deprived of the untainted judgment to which he is entitled by our Constitution... "[C]orruption (a species of bias) and incapacity are cut from the same cloth...," but we do note an important difference: a corrupt judge has a choice; by definition, an addict driven by compulsion does not. An addict is an addict 24 hours a day, seven days a week.

...

[This case] is about uncontroverted allegations of illegal drug use, of crimes, and of addiction to an illegal mind-altering substance, one that distorts perceptions and degrades judgment. In the vernacular, it is a substance that with chronic abuse renders smart people average and average people stupid. **If it is against the law to drive a vehicle under the influence of marijuana, surely it must be at least equally offensive to allow a judge in a similar condition to preside over a capital trial.**

The Constitution may not entitle everyone to the wisdom of Solomon, but it does at a minimum entitle everyone to judicial judgment not impaired by mind-altering illegal drugs. We see no cause to be concerned about the stability of the justice system by pausing her to make sure that the

> Constitution has been respected and that the State will not take life without due process of law. "What was true two centuries ago is true today: 'Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges.'" *United States v. Microsoft*, 253 F.3d 34, 115 (D.C. Cir. 2001) (quoting CODE OF CONDUCT FOR UNITED STATES JUDGES CANON 1).

Summerlin v. Stewart, 267 F.3d 926, 950, 955-56 (9th Cir. 2001), *opinion withdrawn on reh'g en banc,* 341 F.3d 1082 (9th Cir. 2003), *and rev'd and remanded on other grounds sub nom. Shriro v. Summerlin,* 542 U.S. 348 (2004) (emphasis added).

The right to a fair trial is a fundamental constitutional right. *See* U.S. Const. Amend. V; Tenn. Const. Article I §17, VI §11. Where there is a defect affecting the entire framework of fairness within which a trial proceeds, that "structural error" is a constitutional error that "deprives defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence'" and the "criminal punishment may [not] be regarded as fundamentally fair." *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Rose v. Clark*, 478 U.S. 570 577 (1986)). Structural errors differ from harmless or plain errors, in that the court does not assess whether the error was harmless beyond a reasonable doubt in its analysis, and the defendant does not need to point to specific instances of error to prove his claim. *See Cottingham v. Cottingham*, 193 S.W. 3d 531, 537 (Tenn. 2006); *State v. Scott*, 33 S.W. 3d 746, 755 n. 6 (Tenn. 2000). Rather, because structural errors involve overriding concerns of fundamental fairness that taint every aspect of the trial, it is impossible to make such a quantitative analysis of the facts. *State v. Bobo*, 814 S.W. 2d 353, 357 (Tenn. 1991); see also *United States v. Kimbrel*, 532 F.3d 461, 469 (6th Cir.

2008) (defining structural errors as errors that affect the "entire conduct of the trial from beginning to end.") Once an error is shown to be structural, no showing or analysis of prejudice is conducted; rather, relief is automatically required. *See United States v. Cronic*, 466 U.S. 648, 659 n. 25 (1984); *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001); *see also Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984).

Courts have determined that errors affecting the constitutional right to a jury trial are structural errors requiring automatic reversal. *See Gideon v. Wainwright,* 372 U.S. 335 (1963); *Bobo*, 814 S.W. 2d at 357. Courts have also held that a non-attorney judge presiding over criminal cases that could result in jail time for the defendant is a fundamental structural error. *See City of Whitehouse v. Whitley*, 979 S.W.2d 263, 267 (Tenn. 1998) (analogizing the right of a defendant facing a jail sentence to be heard by an attorney-judge to the constitutional right to counsel); *Gordon v. Justice Court*, 525 P.2d 72, 76 (Cal. 1974) (noting that "the United States Supreme Court has recognized for many years that the very character of certain procedures make it impractical to establish the degree of prejudice which has resulted there from" in determining that a non-attorney judge over criminal cases that involved jail time was structural error); *Jordan v. Massachusetts*, 225 U.S. 167 (1912) (held that "[d]ue process implies a tribunal *both impartial and mentally competent* to afford a hearing.")

Both the United States and Tennessee Supreme Courts have held that a corrupt or biased judge presiding over trial can be a due process violation that mandates a finding of structural error. *See, e.g., In re Murchison*, 349 U.S. 133, 135 (1955) (holding that "trial before a judge who was at the same time the complainant, indicter, and

prosecutor" violated due process and was structural error); *Tumey v. Ohio*, 273 U.S. 510 (1927) (holding that a village mayor with a pecuniary interest in the case cannot act as judge without violating the defendant's due process rights); *State v. Benson*, 973 S.W.2d 202 (Tenn. 1998) (holding that a judge who unsuccessfully solicited a bribe from the defendant could not have given that defendant a fair trial). "[T]he right to an impartial judge is one of the rights that are so basic to a fair trial that their infraction has **never** been treated as harmless." *Benson*, 973 S.W.2d at 207 (citing *Bobo*, 814 S.W.2d at 357 (Tenn. 1991)) (emphasis added).

Likewise, Federal Circuit Courts have recognized that a fair trial cannot occur without an impartial judge: "The reason for regarding this level of constitutional failure as 'structural' is obvious: impartiality is the *sine qua non* of judging. Bias or favoritism is utterly irreconcilable with and necessarily perverts the judicial function. The rule of law which provides the framework for our system of justice is thwarted by a judge marching to an unauthorized drummer." *Summerlin*, 267 F.3d at 956.

Appearance of Impropriety

The *appearance* of judicial bias or partiality alone can mandate a finding of structural error. While the United States Supreme Court has acknowledged several specific situations where likely or apparent judicial bias would not "rise to the level" of structural error, sometimes the appearance of judicial bias is so prevalent, as in the case of former Judge Baumgartner, that it requires the presumption of structural error. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) ("[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'") (quoting

Murchison, 349 U.S. at 136); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (noting "four instances of possible bias, while prudent grounds for disqualification as a matter of ethics, generally do not rise to the level of a structural error." These are matters of kinship, personal bias, state policy, and remoteness of interest).

To show the potential for bias sufficient for a finding of structural error, the defendant does not need to show over-the-top courtroom behavior or an extraordinary admission from the judge making his partiality plain, rather he must only show that the judge is in a position "which would offer a *possible temptation* to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused" such that it "denies the latter due process of law." *Tumey*, 273 U.S. at 532 (emphasis added); *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (explaining that a determination of whether a judge's participation in a case violated the litigants' due process rights does not require determining whether the judge was in fact influenced against a party).

For example, in *Bracy v. Gramley*, the United States Supreme Court determined that the petitioner showed good cause for discovery on his claim of structural error due to likely compensatory judicial bias by the judge in his trial because that judge had been taking bribes in other trials. 520 U.S. 899 (1997). The petitioner claimed his trial judge's corruption and illegal actions in taking bribes in other criminal cases motivated the judge to curry favor with the state prosecutors in his own trial, even though no actual bribes had taken place, in order to avoid scrutiny of his actions in taking bribes avoid scrutiny

of his actions in taking bribes from defendants **in other trials**. *Id.* The Court, overruling the Seventh Circuit's decision, held that the appearance of bias from the judge having "an interest in a conviction [in the petitioner's case, in order] to deflect suspicion that he was taking bribes in other cases" would be reason enough to find a due process structural error. *Id.* at 901.

This Court has also addressed the issue of presumed judicial bias arising from corruption. In *State v. Benson*, the court held that a likelihood of judicial bias stemming from a defendant's refusal to cooperate with a judge's solicitation of a bribe would "constitute a denial of the petitioner's fundamental constitutional right to a fair trial before an impartial judge." 973 S.W.2d 202, 206 (Tenn. 1998). In evaluating the petitioner's claim, the court noted:

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired.

Id. at 207 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986)). The Sixth Circuit has likewise made it clear that due process "require[s] not only an absence of actual bias, but an absence of even the appearance of judicial bias." *Anderson v. Sheppard*, 856 F.2d 741, 746 (6th Cir. 1988); *see also Railey v. Webb*, 540 F.3d 393, 400 (6th Cir. 2008) ("[A] judge can and should be disqualified for 'bias, [ ] a likelihood of bias[,] or [even] an appearance of bias.'") (quoting *Ungar v. Sarafite*, 376 U.S. 575, 588 (1964)); *United States v. Frazier*, 584 F.2d 790, 794 (6th Cir. 1978) ("[T]he basic requirement is

impartiality in demeanor as well as in actions."). This Court recently reaffirmed these principles in *Smith v. State*, 357 S.W. 3d 322 (2011).

The unethical behavior exhibited by the former judge in other judicial situations, his criminal conduct outside the courtroom and within the courthouse itself, and his drug use, not only undermines the presumption of his integrity as a judge in Mr. Davidson's trial, but it also creates a clear objective appearance of bias and partiality as he had an interest in currying favor with state prosecutors to deflect any investigation into his own actions or receive leniency for his mistress drug dealer.

"[T]he judge's impartiality might be reasonably questioned because the **appearance of bias** is an injurious to the integrity of the judicial system as actual bias." *Smith v. State*, 357 S.W.3d 322 (Tenn. 2011) (quoting *Bean v. Bailey*, 280 S.W. 3d 798 (Tenn. 2009) (emphasis added).

> More recently, we have observed that if the public is to maintain confidence in the judiciary, it is required that cases b tried by unprejudiced and unbiased judges. The preservation of the public's confidence in judicial neutrality requires not only that the judge be impartial in fact, but also that the judge be perceived to be impartial. If the public is to maintain confidence in the judiciary, cases must be tried by unprejudiced and unbiased judges. It is the appearance that often undermines or resurrects faith in the system. To promote public confidence in the fairness of the system and to preserve the system's integrity in the eyes of litigants and the public justice must satisfy the appearance of justice.

Id. at 340 (internal quotations and citations omitted.)

Judge Baumgartner's actions were so unethical and corrupt so as to create the presumption that he could not have exercised proper judgment in order to give Mr. Davidson a fair trial, and therefore Judge Blackwood correctly held that Judge

Baumgartner's presiding over Mr. Davidson's trial during this period was structural error that required no specific showing of prejudice.

In late October, 2009, **during** Mr. Davidson's trial, the former judge was notoriously involved in the incident at St. Mary's Hospital that resulted in Ms. Castleman's charge for possession of narcotics found hidden in her hospital room. Not only hospital staff and security, but the police and prosecutors investigating the crime, were aware that former Judge Baumgartner had visited Ms. Castleman during her stay in the hospital on a daily basis, that Ms. Castleman had seemed high on drugs at times after the former judge had visited her, and that he was upset and combative when he learned that Ms. Castleman had been placed on restricted visitation. *See* State's Addendum 15 Int. with Larry Allen at DA/TBI-000775; Int. with Margaret Hinkle at DA/TBI-000852; Int. with Gloria McMahan at DA/TBI-000925; Int. with Jennifer Kern at DA/TBI-000927; Int. with Angela Mullinax DA/TBI-000929-30.

Thus, while Judge Baumgartner was not soliciting bribes from defendants in his court as the judges in *Bracey* and *Benson*, his criminal involvement with former defendants from his court coupled with his illegal drug use at the time of Davidson's trial make his actions just as corrupt. Therefore, the former judge had an equally strong motive to favor the prosecution during the trial as he knew state officials were aware of his unusually close relationship with Ms. Castleman, her visits to his chambers while high, and his visits to her while in the hospital during which time she was charged with illegal drug possession. Thus, as a result of the St. Mary's incident, occurring during Mr. Davidson's trial, the scrutiny under which Judge Baumgartner would obviously have

known he could be subjected by law enforcement officials gave him a particularly acute motivation at that time to favor the prosecution and deflect their attention from his own illegal conduct.

"[W]hen the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired." *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986).

Mr. Davidson's Right to a Fair Trial Includes the Right to an Impartial, Mentally Competent Tribunal.

The U.S. Supreme Court has held that as a constitutional predicate, "[d]ue process implies a tribunal both impartial and *mentally competent* to afford a hearing." See *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912); *see also Tanner v. United States*, 483 U.S. 107 (1987); *Peters v. Kiff*, 407 U.S. 493 (1972). This right to an impartial and mentally competent tribunal necessarily includes both jury and judge.

The Ninth Circuit has found *See Summerlin v. Stewart*, 267 F.3d 926 (9th Cir. 2001) (holding that a judge presiding over a murder trial while intoxicated on marijuana violates constitutional due process requirements under similar reasoning as the U.S. Supreme Court's decisions in *Tanner* and *Jordan* dealing with juror incompetence) *opinion withdrawn on reh'g en banc,* 341 F.3d 1082 (9th Cir. 2003), *and rev'd and remanded on other grounds sub nom. Schriro v. Summerlin*, 542 U.S. 348 (2004); *see also* Sarah R. Greene, *Retroactivity of New Rules of Constitutional Law: Why the Supreme Court Should Have Overturned Warren Summerlin's Unconstitutional Death Sentence*, 13 Wm. & Mary Bill Rts. J. 275 (2004) (discussing the subsequent procedural

history of *Summerlin* and death penalty jurisprudence after *Ring v. Arizona*).

Specifically, in *Summerlin*, the court held that allegations that the state court judge, who presided over the defendant's bench trial for murder was under the influence of marijuana at the time, were sufficiently credible to warrant an evidentiary hearing on the matter, and if they were true, the judge's intoxication was a due process violation. 267 F.3d at 926. Based on the defendant's contentions and the states' stipulation to the factual allegations that there was "very compelling" evidence of the judge's drug use, that the judge's drug use began prior to the trial, and the judge's abuse of marijuana was in "full bloom" during the trial and sentencing, the court found ample reason to grant the evidentiary hearing. *Id.* at 950. In making its determination, the court noted:

> One's legal conscience simply recoils at the shocking thought that the due process clause of the Fourteenth Amendment is satisfied by a judge presiding over a criminal trial and making life or death sentencing decisions while under the influence of, or materially impaired by, the use of an illegal mind-altering substance. Such proceedings before a mentally incompetent judge would be so fundamentally unfair as to violate federal due process under the Constitution.

Id. at 950.

Moreover, given the extreme nature of the former judge's addiction, the time frame of his drug usage, and the statements by observers, there is no question that he was using narcotics while presiding over Mr. Davidson's trial. Likewise, there is no question that this heavy use of narcotics impaired his ability to make fair, informed judgments on legal issues that arose during the course of the trial or to observe the trial with enough retention to make sufficiency of the evidence or thirteenth juror determinations.

"The denial of the petitioner's right to an impartial judge is a constitutional error that affects the integrity of the judicial process. **A new trial is the only remedy.**" *State v. Benson*, 973 S.W.2d 202, 207 (Tenn. 1998) (emphasis added); *see also Knapp v. Kinsey*, 232 F.2d 458, 465 (6th Cir. 1956) ("If this basic principle [of freedom from judicial bias or prejudice at trial] is violated, the judgment must be reversed."); *State v. Bobo*, 814 S.W. 2d 353, 357 (Tenn. 1991) ("[A]ny errors affecting the constitutional right to trial by jury will result in such prejudice to the judicial process that automatic reversal is required."). Therefore, to uphold the integrity of the judicial process, Judge Blackwood was correct to find that structural error existed in this case and the only remedy is a new trial.

CONCLUSION

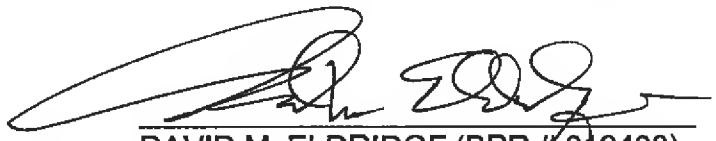
As the seal of the Tennessee Judiciary proclaims, *Fiat Justitia Ruat Caelum*, "Let Justice Prevail Though the Heavens May Fall." The quote forming the basis for the seal of the Tennessee judiciary comes from *Somerset v. Stewart*, 98 Eng. Rep. 499, 509 (K.B. 1772) (Lord Mansfield, Chief Justice) (granting writ of habeas corpus to a Virginia slave, holding that slavery was illegal under English common law). *See* Paul Finkelman, *"Let Justice Be Done, Though the Heavens May Fall": The Law of Freedom*, 70 Chi.-Kent L. Rev. 325 (1994).

While it is preferable to ensure that the fundamental constitutional rights of defendants are protected during what should be the first and only trial if properly conducted, that simply did not occur here. The judicial misconduct and criminal acts of the trial judge tainted the entirety of the pretrial and trial process in Mr. Davidson's case,

and Judge Blackwood correctly applied the law in finding that this resulted in structural error that can only be cured by a new trial. Further, Judge Blackwood correctly applied the law in finding that Judge Baumgartner had not fulfilled his role as thirteenth juror and the Judge Blackwood himself could not do so. The trial court's decision that it cannot act as thirteenth juror for any reason belongs to the discretion of trial court alone and cannot be disturbed by this Court on appeal. Accordingly, the State's Application for an Extraordinary Appeal should be denied.

Respectfully submitted this 18th of May 2012,

ELDRIDGE, BLAKNEY & TRANT, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing pleading was forwarded, via e-mail transmission, by hand delivery and/or by placing the same in the United States mail, with proper postage affixed thereon, to:

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This 18th day of May, 2012.

DAVID M. ELDRIDGE

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE v. LETALVIS COBBINS, LEMARICUS DAVIDSON, and GEORGE THOMAS

Criminal Court for Knox County
Nos. 86216A, 86216B, & 86216C

No. E2012-00448-CCA-R10-DD

ORDER

The State of Tennessee, through the Office of the Attorney General, has filed an application for an extraordinary appeal, see Tenn. R. App. P. 10, seeking review of the trial court's order granting the Defendants new trials on grounds that: (1) former Judge Richard Baumgartner, who presided over each of the Defendants' trials, committed "numerous egregious actions" in violation of both the criminal law and the Code of Judicial Conduct while presiding over the cases resulting in structural error that denied these Defendants their rights to fair trials; and (2) former Judge Baumgartner did not discharge his duty as the thirteenth juror in these cases before leaving the bench and the successor judge on these cases "is unable to serve as thirteenth juror" given "the numerous issues concerning the credibility of both certain testifying witnesses and the trial judge."

In our review of this matter, we first will set out the chronology. The Defendants were found guilty by three separate juries of the first degree murders of Channon Christian and Christopher Newsom as well as various other non-capital offenses arising out of the same criminal episode that resulted in the murders, including, but not limited to, especially aggravated kidnapping, aggravated rape, and especially aggravated robbery.

The Defendants were tried separately on the following dates:

Defendant Cobbins:	August 17 through August 26, 2009
Defendant Davidson:	October 19 through October 30, 2009
Defendant Thomas:	December 1 through December 10, 2009

Defendant Lemaricus Davidson was sentenced to death by his jury for the murders of both Christian and Newsom. Defendant George Thomas was sentenced to life without the possibility of parole for the murders of both Christian and Newsom by his jury. Defendant Letalvis Cobbins was sentenced by his jury to life without the possibility of parole for the

murder of Christian. Defendant Vanessa Coleman, who is not a party to this motion, received an effective sentence of fifty-three years for facilitation of the first degree murder of Christian, as well as for her other convictions. Her trial was held from May 3 through May 10, 2010.

At the sentencing hearings on the Defendants' non-capital convictions, former Judge Baumgartner commented at length on his view of the evidence presented during each of the trials in the course of his discussion of the appropriateness of applying certain statutory aggravating and mitigating circumstances to the non-capital sentencing decisions. Subsequently, on March 10, 2011, he pled guilty to one count of official misconduct and resigned from the bench that same day. At that point, the Defendants' motions for new trial had not yet been heard. Subsequently, Senior Judge Jon Kerry Blackwood was designated by the supreme court to hear the Defendants' motions for new trial and perform all other duties required of a trial judge on these cases.

On June 9, 2011, a hearing was held on the motion for new trial filed by counsel for Defendant Cobbins. At that hearing, Senior Judge Blackwood stated that he believed he could "proceed with the motion for a new trial."

Senior Judge Blackwood then proceeded to discuss, based upon his review of the record in this case, the extent he believed that witness credibility had been a factor. He then concluded that while witness credibility "play[ed] a part in every criminal trial," there was "ample other physical evidence in the record" and "ample other testimony in the record" such that he could discharge his responsibility as thirteenth juror in the case. Senior Judge Blackwood then announced that he "accept[ed] and approve[d] the verdict of the jury as the 13th juror." However, he announced that he would not enter an order denying Defendant Cobbins' motion for new trial until defense counsel in that case and the other cases had an opportunity to amend their motions for new trial and present argument at a hearing on the structural error issue that had been raised by counsel for Defendant Cobbins in an amendment to his motion for new trial filed on the morning of the June 9, 2011 hearing.

Counsel for the Defendants subsequently filed amended motions for new trials, asserting both the structural error and thirteenth juror arguments. At the conclusion of the hearing on the amended motions, Senior Judge Blackwood granted all four Defendants new trials based both upon his structural error finding and his conclusion that he could not act as thirteenth juror in this case. In his findings of facts and conclusions of law, entered following the hearing, Senior Judge Blackwood concluded that former Judge Baumgartner had not acted as thirteenth juror as to the trials and that they "were beset by significant credibility concerns regarding both certain witnesses and the trial judge." The order stated that while the court "had previously determined that it was able to serve as thirteenth juror

in Mr. Cobbins' case, . . . any order denying Mr. Cobbins' motion for new trial relative to the thirteenth juror issue [was] hereby withdrawn."

Defendant Coleman is not a party to this motion. The State did not seek to appeal the granting of a new trial as to Coleman. In its Rule 10 application, the State asserts that "[b]ecause the thirteenth-juror rule was already satisfied prior to [Senior] Judge Blackwood's designation to hear these cases, Judge Blackwood exceeded his authority to vacate the juries' verdicts under the thirteenth-juror rule." Finally, citing to State v. McKim, 215 S.W.3d 781, 792 (Tenn. 2007), the State argues that without an extraordinary appeal in these cases, it will "lose a right or interest that may never be recaptured," because if the Defendants are retried, the challenge by the State to the order granting the new trials will have become moot. We will consider these claims.

Initially, we note that our decision in this order pertaining to the State's Rule 10 application can neither affirm nor reverse the trial court's grounds for granting new trials. Furthermore, if the State's application to appeal were granted, only two possible results could occur in each case following briefing and oral arguments. Either the trial judge's order granting a new trial would be affirmed on at least one of the grounds (affirmance of the order would not require agreement with the trial court on *both* grounds) and new trials for each Defendant would be held, probably many months after they are currently scheduled; *or*, this court would reverse the trial court's order granting new trials, and then the trial court would have to rule on the remaining grounds for new trial asserted by Defendants Cobbins, Davidson, and Thomas. The results of the hearings on the remaining grounds for new trial could result in the trial court again granting a new trial to one or more of the three named Defendants, or if all the motions for new trial were denied, then the Defendants would be entitled to appeal their convictions and sentences – a second round of appeals. Meanwhile Defendant Coleman's new trial would have been held, and, if she is convicted again, her appeal from those convictions could be well on the way toward final disposition. We mention this scenario not to state what we feel should or would occur, but only to point out some of the considerations made when contemplating judicial efficiency. We next will review the circumstances under which the State's Rule 10 application may be granted.

First, we note the court rules which are applicable to our consideration.

Rule 33(d) of the Tennessee Rules of Criminal Procedure provides that "[t]he trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence." In State v. Carter, 896 S.W.2d 119, 122 (Tenn. 1995), the supreme court interpreted this rule as "impos[ing] upon a trial court judge the mandatory duty to serve as the thirteenth juror in every criminal case," explaining that "approval by the trial judge of the jury's verdict as the thirteenth juror is a necessary prerequisite to imposition of a valid judgment." Id. When the same judge who presided over the trial overrules a defense motion

for a new trial without comment, "an appellate court may presume that the trial judge has served as the thirteenth juror and approve the jury's verdict." Id. Such statements by the trial judge must be "clear and unequivocal." State v. Moats, 906 S.W.2d 431, 435 (Tenn. 1995).

Rule 25(b)(1) of the Rules of Criminal Procedure states: "After a verdict of guilty, any judge regularly presiding in or who is assigned to a court may complete the court's duties if the judge before whom the trial began cannot proceed because of absence, death, sickness, or other disability." Rule 25(b)(2) provides that "[t]he successor judge may grant a new trial when that judge concludes that he or she cannot perform those duties because of the failure to preside at the trial or for any other reason." This court has held that a successor judge's consideration, pursuant to Rule 25(b), of whether the duties of the original judge with regard to a motion for new trial can be met in a particular case "must include an assessment of his or her ability to act as a thirteenth juror, including witness credibility." State v. Nail, 963 S.W.2d 761, 765 (Tenn. Crim. App. 1997); see also State v. Biggs, 218 S.W.3d 643, 653-54 (Tenn. Crim. App. 2006); State v. Brown, 53 S.W.3d 264, 275 (Tenn. Crim. App. 2000). This assessment in turn requires the successor judge to determine "the extent to which witness credibility was a factor in the case and the extent to which he [or she] had sufficient knowledge or records before him [or her] in order to decide whether the credible evidence, as viewed by the judge, adequately supported the verdict." Nail, 963 S.W.2d at 766; see also Biggs, 218 S.W.3d at 654; Brown, 53 S.W.3d at 275. If these determinations cannot be made by the successor judge, then the verdict cannot be approved and a new trial must be granted. See Biggs, 218 S.W.3d at 654; Brown, 53 S.W.3d at 275; Nail, 963 S.W.2d at 766.

This court has held that the State may attempt to appeal, when the trial court grants a new trial to a convicted defendant, by utilizing Tennessee Rule of Appellate Procedure 10. State v. Perry, 740 S.W.2d 723, 724 (Tenn. Crim. App. 1987). However, it is obvious that the situation must comport with the requirements of Rule 10. As per its specific provisions, that rule is applicable only in two situations:

> 1. If the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or
>
> 2. If necessary for complete determination of the action on appeal as otherwise provided in these rules.

Tenn. R. App. P. 10(a).

As to the first situation, our supreme court in State v. Willoughby, 594 S.W.2d 388 (Tenn. 1980), listed six conditions that would make a Rule 10 extraordinary appeal appropriate. These conditions, along with our conclusion as to their applicability to the Rule 10 application before us, are set forth as follows:

1 & 2. Where the *ruling* of the court below represents a fundamental illegality or where the *action* of the trial judge was without legal authority.

We conclude that the trial court's granting of the motions for new trial on the basis of (a) inability to act as thirteenth juror as the successor judge and (b) fundamental structural error cannot be said to be a fundamental illegality or be without legal authority. In other words, the trial judge has the authority and legal ability to grant a new trial on either ground.

3 & 4. Where the ruling constitutes a failure to proceed according to the essential requirements of the law *or* where the action of the trial judge constituted a *plain and palpable* abuse of discretion.

Likewise, we cannot conclude that the trial court acted with a "plain and palpable" abuse of its discretion. The record itself bears out this conclusion. Further, the record in this Rule 10 application does not reflect that the trial court failed to "proceed according to the essential requirements of the law." The State was allowed to be heard on all arguments raised by the Defendants. We do note that, in the motion for new trial hearing, the State never argued that former Judge Baumgartner satisfied the requirement to act as thirteenth juror during the sentencing hearings of the Defendants, a principal argument before this Court in its Rule 10 application. While we decline to conclude that this specific argument is waived because of a failure to present it at the appropriate time in the trial court, it is significant in consideration of whether these two conditions, *and* the final two conditions listed below, apply in this case.

5 & 6. Where the ruling is tantamount to the denial of either party of a day in court *or* where either party has lost a right or interest that may never be recaptured.

As stated previously, the State was allowed to fully present any arguments it wished to provide at the hearing on the motion for new trial. The ruling by the trial court does not bar the State from prosecuting any of the three Defendants for the cases which are the subject of the Rule 10 application.

Arguably the only "right or interest" lost by the State is the "right" to have an appellate court affirm all of the convictions and sentences. However, as previously stated, even if this Rule 10 application is granted, this Court would not be reviewing all of the issues regarding the convictions and sentences. The result of an extraordinary appeal could only be either (1) new trials as currently ordered, or (2) further appeals by the Defendants on the remaining issues (or possibly *another* application by the State to appeal if the trial court

granted any of the Defendants a new trial on another ground).

As to the second situation when Rule 10(a) is applicable, the Advisory Commission Comments to Rule 10 state in part, "The circumstances in which review is available under [Rule 10], however, are very **narrowly circumscribed** to those situations. . . as may be necessary to permit complete appellate review **on a later appeal.**" (emphasis added) We interpret the rule, in light of these comments, to mean that a Rule 10 appeal is applicable under 10(a)(2) when a legal issue arises while criminal proceedings are pending prior to a judgment being entered, when there is the possibility of a later direct appeal. Therefore it would not apply to the situation, as exists here, where the trials were completed, judgments were entered, but new trials were ordered post verdict.

The fact that the State did not prevail in the motion for new trial, standing alone, does not authorize the granting of an extraordinary appeal to review the trial court's action. If it did, then the Tennessee Rules of Appellate Procedure would grant the State an appeal as of right pursuant to Rule 3(c).

We have thoroughly reviewed the documents appended to the State's application. Defendant Coleman was granted a new trial for the same reasons that Defendants Cobbins, Davidson, and Thomas were granted new trials. As previously stated, the State explicitly chose not to seek appellate review as to Defendant Coleman's case. The only difference we can detect in Defendant Coleman's case and those of the other three Defendants is the *degree* of the problems that caused the trial court to render its ruling, not the existence of the problems.

For reasons which we will explain, we therefore conclude that the State's application for extraordinary appeal pursuant to Tennessee Rule of Appellate Procedure 10 must be denied. While not all of the factual situations leading us to this conclusion are listed below, the most significant ones are as follows.

First, the State and all Defendants entered into a stipulation that statements made by various persons interviewed by Tennessee Bureau of Investigation ("TBI") agents are facts deemed true (in other words, not merely a stipulation as to what these witnesses would say if called to testify). The State reserved objection to some portions of the statements as to relevancy and hearsay. As per the record available before us, the following facts in support of the trial court's ruling exist *as to these proceedings only*.

In this regard, we note that the portion of the TBI reports which were made public records show that former Judge Baumgartner, starting well before the trials in these matters, and continuing through them, was a heavy user of alcohol and legally and illegally obtained

narcotics and that his impairment was suspected by, among others, prosecutors, nurses, law enforcement officers, and court personnel.

In addition, it is clear from the record before us that former Judge Baumgartner explicitly reserved acting as thirteenth juror on Defendant Davidson's convictions of the first degree murders of Christian and Newsom, and as to the resulting death sentences imposed by the jury as to each victim. During Defendant Davidson's sentencing hearing on the non-capital offenses, former Judge Baumgartner stated:

> You are – Mr. Davidson, you are not somebody that should be on the street with the rest of us. You should never, ever, ever be on the street with the rest of us. The jury has determined that you're guilty beyond a reasonable doubt of the first-degree murder of these two young people. They've determined that the appropriate sentence is death. I think – I have a motion for a new trial to go, so I'm going to reserve expressing my opinion on that until we have a motion for new trial. But, in my judgment, there is no sentence great enough to punish you for the conduct that you've been convicted of.

In view of the legal authorities and the reasoning which we have set out, we conclude that this is not a case in which a Rule 10 appeal is appropriate. By this order, we neither affirm nor deny the rulings of the successor trial court but, instead, conclude that the Rule 10 application of the State should be denied. Accordingly, for all of the reasons set forth above, the application for an extraordinary appeal is DENIED. Costs on appeal are taxed to the State of Tennessee.

ALAN E. GLENN, JUDGE

THOMAS T. WOODALL, JUDGE

Dissent by ROBERT W. WEDEMEYER, JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE v. LETALVIS DARNELL COBBINS, LEMARICUS DEVALL DAVIDSON, and GEORGE GEOVONNI THOMAS

Criminal Court for Knox County
Nos. 86216A, 86216B & 86216C

No. E2012-00448-CCA-R10-DD

ROBERT W. WEDEMEYER, J., dissenting.

Upon consideration of the arguments, transcripts, and record presently before this Court, I respectfully disagree with my colleagues' conclusion that the State's Rule 10 application for extraordinary appeal should be denied. In my view, the State set forth valid arguments on both the thirteenth juror issue and structural error issue to warrant this Court to exercise its discretion and grant extraordinary review pursuant to Rule 10 of the Rules of Appellate Procedure.

A. Thirteenth Juror

In its Rule 10 application, the State presents a compelling argument, supported by trial transcripts, that Judge Baumgartner fulfilled his thirteenth juror obligation through statements at each Defendant's respective post-trial hearings. The State contends that, because Judge Baumgartner fulfilled the thirteenth juror requirement, Judge Blackwood had neither the legal authority nor the legal obligation to act as the thirteenth juror in any of the three cases. The State concludes that Judge Blackwood's decision to grant a new trial for each of the three Defendants, based on the thirteenth juror rule, was without legal authority and, therefore, presents a valid basis for granting the Rule 10 application for extraordinary appeal. *See State v. McKim*, 215 S.W.3d 781, 791 (Tenn. 2007) (citing *State v. Willoughby*, 594 S.W.2d 388, 392 (Tenn. 1980) ("This Court has stated that a Rule 10 extraordinary appeal will lie whenever the prerequisites for common law certiorari exist: . . . the trial court's action is without legal authority . . . ."). If Judge Baumgartner did indeed satisfy his

thirteenth juror duty, Judge Blackwood then would have "so far departed from the accepted and usual course of judicial proceedings as to require immediate review." Tenn. R. App. P. 10(a)(1). Because the State presents a valid argument, complete with supporting documents, on the issue, I believe it has satisfied the threshold showing to warrant further proceedings. Therefore, I would grant the State's Rule 10 application for extraordinary review.

B. Structural Error

After thorough research on this issue, I have concluded that the appropriate legal standard for determining whether there is structural error in a trial is unclear. Further, it is unclear whether the legal reasoning and analysis Judge Blackwood applied in his decision to grant a new trial to each of the three Defendants, based on structural error, constituted the appropriate standard. If the appropriate standard requires, as the State argues, that the Defendants demonstrate a connection between Judge Baumgartner's misconduct and his decisions at trial, then Judge Blackwood applied an incorrect standard, and the Defendants have failed to show that they did not receive fair trials. *See Thurmond v. McKee*, No. 1:06-cv-580, 2009 WL 929001, at *18 (W.D. Mich. Apr. 2, 2009) (". . . even assuming the existence of some due-process principle at work in the present case, that principle would certainly require evidence that the judge's personal problems have had some substantial impact on the fairness of a criminal defendant's trial."). At this point in the appeals process, none of the Defendants have demonstrated any specific instances of bias or unfairness by Judge Baumgartner in their respective trials. Therefore, I would grant the Rule 10 application for extraordinary appeal, ordering that all parties fully brief and orally argue the issue, in order for this Court to properly determine a resolution. Tenn. R. App. P. 10(a) ("[A]n application for extraordinary appeal lies from an interlocutory order of a lower court . . . [i]f necessary for complete determination of the action on appeal . . . .").

Conclusion

Accordingly, for the reasons set forth above, I conclude that the State's Rule 10 application for an extraordinary appeal should be GRANTED.

ROBERT W. WEDEMEYER, JUDGE